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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD T. DERTHICK and DERTHICK ASSOCIATES, INC., STANLEY ROBBINS and STAN ROBBINS AND ASSOCIATES, INC., SLAYTON ASSOCIATES, INC.,

Petitioners,

—v.—

BASSETT-WALKER, INC. and V. F. CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower courts violated summary judgment procedures by determining that petitioners were not "employees" for the purpose of the Age Discrimination in Employment Act ("ADEA"), rather than treating petitioners' showing as giving rise to disputed fact issues required to be determined at trial.

2. Whether the summary judgment dismissal of litigation commenced by former sales representatives notwithstanding the existence of multiple disputed fact issues is contrary to applicable summary judgment procedures.

LIST OF PARTIES TO PROCEEDINGS BELOW

RICHARD T. DERTHICK and DERTHICK ASSOCIATES, INCORPORATED;

Petitioners,

v.

BASSETT-WALKER, INCORPORATED and V F CORPORATION,

Respondents.

STANLEY ROBBINS and STAN ROBBINS AND ASSOCIATES, INCORPORATED,

Petitioners,

v.

BASSETT-WALKER, INCORPORATED and V F CORPORATION,

Respondents.

SLAYTON ASSOCIATES, INCORPORATED

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No. ___-_____

In the Supreme Court
of the
United States

October Term, 1996

RICHARD T. DERTHICK and DERTHICK ASSOCIATES, INCORPORATED; STANLEY ROBBINS and STAN ROBBINS AND ASSOCIATES, INCORPORATED; SLAYTON ASSOCIATES, INCORPORATED.

Petitioners,

v.

BASSETT-WALKER, INCORPORATED and V F CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Richard T. Derthick, Derthick Associates, Incorporated, Stanley Robbins, Stan Robbins and Associates, Incorporated, and Slayton Associates, Incorporated, plaintiffs in separate proceedings below, respectfully request the issuance of a writ of certiorari to review the judgment and decision of the United States Court of Appeal for the Fourth Circuit filed on February 12, 1997 and the denial of the petition for rehearing and suggestions for rehearing en banc dated March 12, 1997.

OPINIONS BELOW

The unreported decision of the United States Court of Appeals for the Fourth Circuit, Derthick Assocs. v. Bassett-Walker, Inc., No. 95-2230, No. 95-2231, No. 95-2232, 1997 U.S. App. LEXIS 2302 (4th Cir. Feb. 12, 1997), is set forth in the Appendix at pages 2 to 13. The United States District Court for the Western District of Virginia (Danville Division), Derthick v. Bassett-Walker, Inc., Civil Action No. 94-0026-D, Civil Action No. 94-0027-D, Civil Action No. 94-0028-D, 904 F.Supp. 510 (W.D.Va. 1995), is set forth in the Appendix at pages 14 to 45. The Order of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing and suggestion for rehearing en banc is set forth in the Appendix at pages 46 to 48. The Mandate of the United States Court of Appeals for the Fourth Circuit is set forth in the Appendix at page 49.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 1997. (a 2-13) The order denying plaintiffs' petition for rehearing and suggestion for rehearing en banc was entered on March 12, 1997. (a 46-48) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA") and

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[1] Citations followed by the suffix "a" refer to the Appendix to the Petition for Certiorari which is filed herewith. Citations preceded by the prefix "JA" refer to the Joint Appendix filed in the United States court of Appeals for the Fourth Circuit.

particularly 29 U.S.C. § 630(f), Chapter 93A Massachusetts General Laws, Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/2 and the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2 and the Virginia Conspiracy Statute, Va. Code. Ann. § 18.2-499(A). The text of the statutes is set forth in the appendix at pp. 50 to 54.

STATEMENT OF THE CASE

These cases involve the use of summary judgment procedures to dismiss litigation notwithstanding the existence of disputed fact issues as to whether a company is an "employer" under the ADEA, and involving determination of allegations of violations of tortious interference and fraudulent business practices under choice of law principles.

As shown in opposition to defendants' summary judgment motion, respondents Bassett-Walker, Inc. ("Bassett-Walker) and V.F. Corporation ("V.F.") terminated their force of veteran sales representatives and replaced them with younger company employees under the guise of a "business restructuring." The action, allegedly taken for "legitimate business reasons," not only wiped out the twenty-year careers of petitioners who had been highly successful in developing sales of more than $100,000,000 per year for Bassett-Walker, but also proved to be a fiasco, viewing the facts and inferences most favorable to the nonmoving party in connection with respondents' summary judgment motion as required under Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). (JA 530-57; 902-905; 914-21; 929-32; 943-63; 1312-33; 1347-69; 1940-8; 1967)

As part of this "restructuring," respondents conspired with one of their customers, the Target Stores ("Target") granting it preferences that deprived the petitioners of their commissions and reputations alike while simultaneously

conspiring, as a quid pro quo to a conspiring customer with a dominant position in the market, to deprive competitive customers of merchandise by reneging upon their projected orders in 1989, the year of petitioners' termination.[2] (JA 696-7; 903; 1323-41)

Respondents issued their surprise termination announcement at a sales meeting in June 1989, in which they terminated all of their veteran sales representatives. (JA 702; 906; 1317) Relationships with sales representatives that had been in effect for over twenty years were unilaterally ended, and they were replaced with younger and less qualified employees.

Petitioners Stanley Robbins and Stan Robbins and Associates, Inc., had served respondents in the New England States from the Boston area from 1968 (JA 1049-51); petitioner Slayton Associates, Inc., had served respondents in Illinois, Indiana, Iowa, Missouri, and Minnesota from 1967 (JA 1414-18); and petitioners Richard Derthick and Derthick & Associates, Inc., had served respondents in Michigan, Ohio, and Western Pennsylvania from 1968 (JA 619).

As compensation, petitioners received commissions on sales. (JA 1909) Due in large part to the success of petitioners' efforts, Bassett-Walker, which had been an obscure company, with insignificant sales in 1965, rose to a position of prominence in the fleeceware industry (JA 900-01), with national sales reaching approximately $300 million. (JA 500) Petitioners' territories produced one-third of that figure, or $100 million, in the year of their termination. (JA 557)

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[2] The respondents knowingly subjected those competitors to substantially higher prices and less favorable terms as a result of the conspiracy with Target Stores. (JA 693)

Although the district court acknowledged that it must "view the facts and/or reasonable inferences in a light most favorable to the non-moving party," the petitioners (JA 1916), it failed to do so. Furthermore, the Fourth Circuit Court of Appeals failed to apply the de novo standard as required

The courts below, in deciding to dismiss the cases on summary judgment, improperly resolved, in a manner not favorable to the non-moving parties, contrary to Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), the issue of whether the respondents' action was the outgrowth of a "legitimate business reasons" (JA 1925), which constitutes a disputed fact issues.

Further, in denying plaintiffs' claims the district court incorrectly stated that "there is no writing, only nonspecific, vague and ambiguous statements" the commitments of Bassett-Walker in dealing with the petitioners and others. (JA 1922) In doing so, the district court failed to note that the "Company Creed" (JA 1313-4) was violated in all respects and the treatment that was accorded to petitioners as shown by the affidavit of Wendel Slayton (JA 1313-1314):

> "23. The "Company Creed" of Bassett-Walker, which was given to the sales representatives during their employment with Bassett-Walker (Slayton Appendix, Exhibit D) states:
>
> > "Bassett-Walker will operate its business to achieve and maintain a standard of excellence. The conduct of business and relationships with employees, customers, and all other associations shall be on an

> honest, fair and equitable basis while providing products of superior value at a fair price." (Emphasis added.)
>
> "24. As a result of the above statements ["Company Creed"] and the pattern and practice of the industry, I made the decision to continue to work for Bassett-Walker. My understanding was that, in return for my continued efforts on behalf of Bassett-Walker, the agreement between myself and Bassett-Walker would be not terminable except for cause."

The violation of the "Company Creed" as quoted above is shown in detail in the affidavit of Robert G. Dykstra submitted on behalf of petitioners (JA 1662). The Dykstra affidavit shows that the accounts of petitioners were cut back substantially by respondents in the amounts that they were permitted to order in 1989. Petitioners were lied to by respondents in being told that the cutbacks were the outgrowth of a "production problem and a demand problem" (JA 1125; 1665-6), when the real reason was because of a discriminatory and preferential commitment made by respondents to Target Stores.

As stated in Mr. Dykstra's affidavit the deceptive acts and practices of respondents caused the withholding of over $25 million dollars in merchandise from petitioners' accounts from their merchandise needs as projected for 1989. (JA 1670-1)

The drastic effect of the cutbacks is shown in a "smoking gun" document generated by respondent Bassett-Walker. (JA 1807; 1671) Injury to petitioners' accounts causing a serious loss of commissions to petitioners (estimated to be $500,000 in 1989) is shown. (JA 1671)

The reduction in the amounts that Mr. Slayton was allowed to sell his accounts was approximately $14,500,000.00; the reduction for Mr. Derthick's accounts was over $7,000,000.00; and the reduction in the amount needed by Mr. Robbins' accounts was approximately $4,835,664.00, in 1989, at a time when the petitioners were still functioning as sales representatives. (JA 1671)

This petition involves three cases that were filed in 1990 and 1991 in the Southern District of New York. (JA 1906)

The three cases were consolidated for the purposes of discovery, which was conducted in the Southern District of New York, and dispositive motions, but not for trial. (JA 1906)

The three cases were transferred to the Western District of Virginia by an Order dated April 7, 1994. (JA 1906)

The district court granted the motion of respondents for summary judgment and dismissed the cases by a Memorandum Opinion filed May 18, 1995, and an Order entered on the same date. (JA 1903)

The Fourth Circuit Court of Appeals, in an unpublished per curiam opinion dated February 12, 1997, affirmed the district court's decision of dismissal. The Fourth Circuit Court of Appeals denied the petition for rehearing and suggestion for rehearing en banc in an order dated March 12, 1997. A Mandate from the Fourth Circuit Court of Appeals was issued on March 20, 1997.

The three complaints allege the causes of action summarized below:

(1) Verified Complaint for Richard T. Derthick and

Derthick Associates dated August 10, 1990 (JA 615): **COUNT I** (Age Discrimination and Violation of the ADEA); **COUNT II** (Breach of Contract); **COUNT III** (Conspiracy Constituting Intentional Interference with Contractual and Advantageous Relationships); **COUNT IV** Conversion of Valuable Property Rights to Commission on Sales from Customers and Accounts based Upon Their Restocking and Reordering Goods and Products from Bassett-Walker).

(2) Complaint for Stanley Robbins and Stan Robbins Associates (JA 1047): **COUNT I** (Age Discrimination and Violation of the ADEA); **COUNT II** (Unfair or Deceptive Acts or Practices, Misappropriate of Trade Secrets, Customer Lists, and Customer Information as an Outgrowth of a Conspiracy to Cheat Plaintiffs out of Their Business and Livelihood and Discriminate Customers and Smaller Accounts, in violation of Chapter 93A of the Massachusetts General Laws); **COUNT III** (Wrongful Termination Contrary to Massachusetts Law); **COUNT IV** (Breach of Contract); **COUNT V** (Tortious Interference (a) By Allocating Merchandise to Other Accounts on a Preferential and Unlawful Basis, (b) By-passing plaintiffs' in Dealing with Their Accounts, and (c) By Terminating Plaintiffs, Maliciously Conspiring with Others to Refuse to Deal with Plaintiffs, so that Defendants could Drive Plaintiffs out of Business, Constituting Tortious Interference); **COUNT VI** (Conversion of Property Rights to the Expectancy of Commissions).

(3) Verified Complaint of Slayton Associates (JA 1413); **COUNT I** (Breach of Contract); **COUNT II** (Violation of Illinois Sales Representatives Act); **COUNT III** (Unfair Trade Practices Causing Injury to Plaintiffs and Consumers Generally in Violation of Illinois Deceptive Trade Practices Act and Consumer Fraud and Deceptive Business Practices Act); **COUNT IV** (Tortious Interference); and **COUNT V** (Conversion of Property Rights to and Expectations of

Continued Commissions in Violation of Fiduciary Duties).

REASONS FOR GRANTING THE WRIT

I. THE QUESTION OF THE PROPER TEST FOR DETERMINING WHO IS AN "EMPLOYEE" UNDER THE ADEA WARRANTS REVIEW

Review of the question of what constitutes an "employee" under the Age Discrimination in Employment Act ("ADEA") is requested in light of the conflicting standards applied by the Circuits, and in particular, the conflict between the summary judgment dismissal affirmed by the United States Fourth Circuit Court of Appeals, and decisions from the other Circuits cited below.

The definition of "employee" in the ADEA is uninstructive, providing only that an employee is "an individual employed by an employer." 29 U.S.C. § 630(f).

In instances such as here, in which the statutory definition is unhelpful, this Court has established a presumption that Congress "means an agency law definition for 'employee' unless [the statute] clearly indicates otherwise." Nationwide Mut. Ins. Co. v. Darden, 112 S.Ct. 1344, 1349 (1992) (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)) (for common law definition of "employee' courts should look to general common law of agency rather than the laws of agency of any particular state).

The district court's dismissal of the complaints affirmed by the Fourth Circuit on defendants' motion for summary judgment concluded that the plaintiffs were independent contractors rather than employees covered by the ADEA, 29 U.S.C. § 630(f). (a 50)

The district court's decision, however, reveals the existence of disputed fact issues not properly decided on summary judgment.

The district court based its decision of dismissal upon what it called "A close examination of the relationship between the parties," and having done so, stated that "Bassett-Walker did not exercise the kind of control required to make the commissioned sales representatives employees." (a 29; emphasis added.)

However, such decisions on disputed fact issues, involving the "kind of control" that would or would not cause an employment relationship to exist involved disputed fact issues not properly decided on a motion for summary judgment.

In affirming such determination of dismissal of the actions, the Fourth Circuit's decision is contrary to the Eleventh Circuit case of Daughtrey v. Honeywell, Inc., 3 F.3d 1488, 1497 (11th Cir. 1993), which states that such disputed issues of material fact as are here involved may not be resolved by a grant of summary judgment. As the opinion states (3 F.3d at 1497):

> "Under either test [hybrid or traditional common-law agency test], therefore, the district court erred by resolving a disputed issue of fact regarding the degree of control exercised by Honeywell over the manner in which Daughtrey performed her services. The District Court granted summary judgment in favor of Honeywell on the ADEA claim for Daughtrey's 1933 termination based solely on her status as an independent contractor. We reverse this judgment in light of the genuine dispute of material fact regarding Honeywell's authority

> over the manner and means by which Daughtrey discharged her duties under the consultant agreement." (Emphasis added.)

Summary judgment is particularly inappropriate with respect to disputed fact issues in discrimination cases. As stated in Gallo v. Prudential Residential Services L.P., 22 F.3d 1219, 1123 (2d Cir. 1994):

> ". . . when deciding whether this drastic provisional remedy should be granted in a discrimination case, additional considerations should be taken into account. A trial court must be cautious about granting summary judgment to an employer when, as here, its intent is at issue."

See also Washington v. Lake Country, Ill., 969 F.2d 250, 254 (7th Cir. 1990) ("Summary judgment generally should be treated with special caution in discrimination cases.").

Similarly Hoosier Home Improv. Co. v. United States, 350 F.2d 640 (7th Cir. 1965), which holds that determination of an employer-employee relationship involved issues "of fact that [were] properly submitted to the jury:

> "It is not difficult to see that the term 'employees' embraces a wide range of persons . . . . Between [the] clear cases is a grey area . . . where the trier of facts must be called upon to make the determination."

The factual nature of such a determination is emphasized in Frankel v. Bally, Inc., 987 F.2d 86 (2d Cir. 1993), in which a district court's dismissal of the plaintiff's ADEA claim was vacated on appeal. The district court had

dismissed the plaintiff's claim on the basis that the plaintiff was an independent contractor rather than an employee, but the Second Circuit, in reversing such decision, Frankel v. Bally stated (987 F.2d at 91):

> ". . .the corporate form under which a plaintiff does business is not dispositive in a determination of whether an individual is an employee or an independent contractor within the meaning of the ADEA. Indeed, no per se rule applies in such circumstances." (Emphasis added.)

As stated in Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 112 S. Ct. 1344 (1992), that there is

> "no shorthand formula or magic phrase that can be applied to find the answer . . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." (Emphasis added). 112 S.Ct. at 1349.

The showing made by plaintiffs included the deposition taken of Mr. Robert Dykstra on May 6, 1992.[3]

Dykstra had worked with plaintiff Derthick, and then, after the sudden termination of the sales representatives, was hired as an employee by Bassett-Walker.

Bassett-Walker does not deny that Dykstra was an employee after he was put on a salary basis. However, in terms of the nature of the functions performed, and the significant

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[3] Pertinent portions of the deposition are set forth in the Appendix submitted herewith at pages 55 to 64.

elements of control exercised by respondents, Dykstra indicated that the job was functionally the same both before and after the restructuring took place. (a 55-64)

The issue of "control" involved in the determination of the existence of an employment relationship presents a disputed fact issue that should not have been decided on summary judgment, see Garcia v. Copenhaver, Bell & Associates, 104 F.3d 1256 (11th Cir. 1997), particularly when doing so negates the availability of the applicable remedial mechanisms of the ADEA. See Robinson v. Shell Oil Company, 519 U.S. ___, 117 S.Ct. 843 (1997).

The granting of dismissal by way of summary judgment by the courts below conflicts with the Eleventh Circuit's decision in Garcia v. Copenhaver, Bell & Associates, 104 F.3d 1256 (11th Cir. 1997).

Garcia states that, for the purpose of the ADEA, "because the Court found the central issue to both the hybrid test and the agency test is the 'hiring party's right to control the manner and means by which the work is accomplished," when there are "disputed facts concerning the amount of control" exercised, "we cannot rule as a matter of law that Garcia is an independent contractor. Therefore, the proper ruling is to deny [the] . . . motion to dismiss . . . and allow the jury to decide if Garcia is an 'employee'. . . ." Garcia v. Copenhaver, Bell & Associates, supra, 104 F.3d at 1266.

On motions for summary judgment, facts and reasonable inferences therefrom must be drawn in a light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The issue of whether or not the petitioners were employees is an element of their ADEA claim and in light of the disputed fact issues regarding the "kind of control"

exercised over them by respondents, the district court therefore was required to deny the motion for summary judgment and submit the issue to a jury. Garcia, supra, 104 F.3d at 1266-1267.

II. THE OPINION BELOW INCORRECTLY APPLIED CHOICE-OF-LAW PRINCIPLES TO DISPUTED FACT ISSUES

The decision below affirmed the incorrect analysis performed by the district court of the choice-of-law question under both Massachusetts and Illinois law. Such misapplication denies the Robbins petitioners and Slayton & Associates their right to pursue actions under the Massachusetts Unfair Trade Practices Act and the Illinois Uniform Deceptive Trade Practices Act and the Consumer Fraud and Deceptive Business Practices Act, respectively.

Petitioners Robbins and Stan Robbins and Associates asserted claims under the Massachusetts Unfair Trade Practices Act. In reliance upon Worldwide Commodities v. J. Amicone Co., 630 N.E.2d 615 (1994), the district court determined that the Robbins petitioners' Massachusetts claims were barred because of the district court's incorrect conclusion that Virginia Law applied thereunder. (a 8, 26)

However, such reliance by the district court is misplaced. The decision in Worldwide Commodities does not dictate that Virginia law apply. The decision in Worldwide Commodities was dependent upon the choice-of-law clause contained in the contract at issue in that case. The Court concluded (630 N.E.2d at 618):

> ". . . since the contract violations were at the core of Worldwide's c. 93A claims, the

> contract's choice-of-law clause bars application of the Massachusetts statute."

The agreement between the Robbins petitioners and the respondents manifestly did not contain any such choice-of-law clause. Thus there is no contractual bar regarding the application of the Massachusetts statute. Furthermore, petitioners' Massachusetts Gen.Laws Ch. 93A claims are independent of their contract claims and address the tortious interference and fraudulent activities of the respondents. Therefore based on the district court's faulty analysis of Worldwide Commodities, the Robbins petitioners were deprived of their right to pursue their claims under the Massachusetts statute.

The courts below further deprived the Robbins petitioners of their right to pursue a claim under the Massachusetts Unfair Trade Practices Act through their erroneous alternative application of Massachusetts law.

The district court concluded that (a 42)

> "even if Massachusetts law applies, plaintiffs' claim fails because the core breach of contract claims did not occur 'primarily and substantially' within Massachusetts, as required under Mass. Ann. Laws ch. 93 A § 11. Not only did most of Bassett-Walker's allegedly bad acts occur in Virginia, including the 1989 termination meeting, but also Robbins' territory included other states."

Furthermore, the Circuit Court failed to applied a de novo review of the district court's determination as to whether the conduct involving the Robbins claim occurred "primarily and substantially" in Massachusetts, which is the test under

Massachusetts law. See Clinton Hospital Association v. The Corson Group, Inc., 907 F.2d 1260 (1st Cir. 1990).

As shown in the record, based upon the Robbins complaint (JA 1047), the affidavit of Mr. Robbins (JA 893), and his deposition testimony (JA 974), Massachusetts was the jurisdiction in which respondents committed unfair trade practices in violation of Massachusetts Gen.Laws. Ann. Ch. 93A, including respondents' conspiracy to limit the orders from Massachusetts accounts of the Robbins petitioners, as a result of their conspiracy with Target Stores thereby leaving Mr. Robbins unable to complete orders for his other accounts, and by charging the accounts of Mr. Robbins in Massachusetts inordinately high prices that were not charged to other accounts. (JA 912-924; 1052-1064) Furthermore, Massachusetts is also the state in which respondents fraudulently induced Mr. Robbins to expend substantial amounts of money under the illusory prospect of becoming a salaried employee. (JA 896; 901; 908-9; 930; 933-6; 1014-18, 1018-24)

The panel ignored the direct relationship between this tortious conduct and Massachusetts only by overlooking, and thus completely failing to apply, the factors outlined in both Clinton Hospital, 907 F.2d at 1264-66, and Bushkin v. Raytheon Co., 393 Mass. 622, 632 (1985). Even assuming arguendo that the deceptive conduct of the respondents originated outside of Massachusetts, that conduct was intended to interfere with, and did in fact affect Mr. Robbins' business in Massachusetts. See Charles River Data Systems, Inc. v. Oracle Complex Systems Corp., 788 F. Supp 54, 61 (D.Mass. 1991). The losses that Mr. Robbins sustained, and the breaches and delays that the Massachusetts customer accounts of Mr. Robbins suffered, occurred in Massachusetts. Worse still, such conduct was a direct result of the unfair and deceptive conduct of respondents and a third party, Target Stores. Clinton, 907 F.2d at 1266. Respondents therefore did not meet their burden

of proving that their unfair and deceptive acts and practices did not occur primarily and substantially in Massachusetts, and the overwhelming weight of the evidence indicates just the contrary. (JA 912-24; 955) Summary judgment for respondents on this issue therefore was required to be denied, and the misapplication of Massachusetts law deprived them of their rights to pursue action under this statute.

The misapplication of state laws by the Courts below also deprived petitioner Slayton Associates of its right to pursue a cause of action under the Illinois Deceptive Trade Practices Act and the Consumer Fraud and Deceptive Business Practices Act. Disputed issues of fact exist as to the violations under these Illinois statutes. (JA 1334-1340; 1424-1438; 1375-1402; 1653; 1662-1676)

The Illinois Consumer Fraud and Deceptive Business Practices Act prohibits price discrimination as a competitive weapon. As shown in the affidavits and testimony of Wendel Slayton (JA 1309; 1373) and Robert Dykstra (JA 1493; 1662) submitted by petitioner, respondents engaged in such violative conduct.

Disputed issues of fact exist as to the propriety of respondents' actions in conspiring with Target Stores with the intent of limiting the supply of goods for other stores and charging other stores higher prices, to the detriment of the other stores as well as consumers. Respondents' conspiracy with Target placed Target's competitors at a comparative disadvantage, causing consumers to bear the burden of the higher prices, as shown in the record. (JA 1665-1671; 1675-6; 1695-1701; 1704-5; 915; 1322; 1326-7; 1334; 1343; 1480-1507.)

As stated in Loughlin v. Evanston Hospital, 113 Ill.2d 374, 550 N.E.2d 986 (1990):

> ". . . to state a cause of action under the Consumer Fraud Act, it is sufficient to allege that the complained-of conduct was 'unfair.': the conduct need not be fraudulent or deceptive."

The incorrect analysis by the Courts below of the Virginia Conspiracy Law, Va. Code. Ann. deprived petitioners of their right to proceed on their claims under Section 18.2-499(A) of the Virginia Conspiracy Law.

Ignoring numerous allegations and evidence presented in the record, the Fourth Circuit's decision incorrectly stated that petitioners "neither alleged, nor offered evidence to support, the malice component required under the Virginia statute." (a 12-13)

Contrary to such statement, allegations of malice are contained in each of the three complaints of the petitioners named herein. (JA 1057; 1068; 1070-71; 1317-8; 1343; 1347-8; 622-3; 625)

The verified complaint in Derthick alleges that (JA 623):

> "50. Said violations constitute a willful and wanton breach of the contractual relationship between the parties resulting from the malicious acts of defendants and wrongfully appropriating for their own benefit plaintiffs' good will and following in the trade in the territory, and the commissions attributable to sales derived therefrom." (Emphasis added.)

The complaint for the Robbins petitioners alleges (JA 1070):

> "136. Intending and contriving to destroy and ruin the business of plaintiffs, and to appropriate to themselves the good will established by plaintiffs, defendants maliciously, willfully and unlawfully conspired to induce various customers to refuse to deal with plaintiffs and to deal directly with defendants."

In addition, the verified complaint in Slayton alleges the following acts of malice by respondents (JA 1432):

> "103. Intending and contriving to destroy and ruin the business of plaintiff, and to appropriate to themselves the good will developed by plaintiff, defendants maliciously, willfully and unlawfully conspired to induce and compel plaintiff's accounts to refuse to deal with plaintiff and to deal directly with defendants."

Additional evidence of malice was presented in the Affidavit of Robert G. Dykstra, formerly a salesperson with petitioner Richard T. Derthick until the termination of the sales representatives in 1989. Mr. Dykstra, who had personally worked with Mr. Derthick and had knowledge of what had happened, states in his affidavit (JA 1665-1666):

> "19. The Target Stores deal was a conspiracy by and between Bassett-Walker, V.F. Corporation and Target Stores the purpose and effect of which <u>was willfully and maliciously to injure the commissioned sales representatives</u> in their reputation, trade, business or profession by (a) depriving their regular accounts of the Bassett-Walker merchandise required by them for the purpose of fulfilling their sales and marketing plans in 1989, (b) providing an unfair

> advantage to Target Stores by making terms available to Target Stores that were not offered to other accounts, (c) deliberately cutting back and withholding merchandise that was known to be needed by other accounts in 1989 so that it could be allocated to Target Stores, providing Target Stores with an unfair competitive advantage on the limited supplies of Bassett-Walker fleecewear products available, (d) thereby reducing the commissions available to the sales representatives on merchandise that otherwise would have been sold to their regular accounts that had indicated a need for such orders as part of the planning process for 1989, (e) ruining the business of the sales representatives by terminating them, and (f) maliciously injuring the terminated sales representatives by falsely indicating to the accounts that the former sales representatives themselves responsible for the delivery delays, poor service and cut-backs on merchandise allocated to such accounts." (Emphasis added.)

Mr. Dykstra's affidavit described in detail the conspiracy involving Target Stores, an account that had belonged to petitioner Slayton Associates. (JA 1321; 1670-1673)

The Fourth Circuit's determination on the issue of malice also is contrary to the holding of the Virginia Supreme Court in Greenspan v. Osheroff, 232 Va. 388, 351 S.E.2d 28 (1986), that the determination of whether the acts of respondents satisfy the malice component of the Virginia conspiracy law is a factual issue to be determined by the jury. As stated in Greenspan, 232 Va. at 388, 351 S.E.2d at 28:

> "We hold, therefore, that when the fact-finder is satisfied from the evidence that the defendants' primary and overriding purpose is to injure his victim in his reputation, trade, business or profession, motivated by hatred, spite, or ill-will, the element of malice required by Code § 18.2-499 is established, notwithstanding any additional motives entertained by the defendant to benefit himself or persons other than the victim."

Evidence of respondents' malice was duly presented to the courts below. The affidavits and deposition testimony presented to the district court raised a genuine issue of fact of the malicious motivation of respondents in injuring petitioners' reputations and in interfering with their businesses by conspiring with Target Stores to injure petitioners and their accounts, causing them to lose millions of dollars in sales and commissions, aside from preventing them from meeting their commercial obligations to their long-standing accounts, requiring that the issue be determined by a jury,. (JA 912-915; 512-23; 557-560; 1328-31; 1366-1369; 1500-01)

Had the Fourth Circuit relied upon a de novo review of the record rather than the incorrect conclusions of the district court, the panel would have determined that malice against the petitioners involving the conspiracy between respondents and Target Stores is a disputed fact issue raised by petitioners' papers in opposition to the motion for summary judgment. The Fourth Circuit would also have determined that the conspiracy claim of petitioners is not barred under the intracorporate conspiracy doctrine under Fox v. Deese, 362 S.E.2d 699, 708 (Va. 1987) because the conspiracy involved the respondents and another entity, Target Stores, thereby satisfying the statutory requirements under Va.Code. Ann. § 18.2-499(A).

Therefore, the lower courts' improper determination of the non-applicability of state laws on the basis of disputed fact issues should not be allowed to prevent the petitioners from pursuing their claims.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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